COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATION AND ENERGY

Verizon New England Inc. d/b/a Verizon Massachusetts Performance Assurance Plan.	)	D.T.E. 03-50

MOTION FOR CONFIDENTIAL TREATMENT

On July 25, 2003, Verizon Massachusetts (Verizon MA") filed with the Department Carrier-to-Carrier Metric Algorithms ("CMAs") in accordance with the Massachusetts Performance Assurance Plan ("PAP").[1] In its filing, Verizon MA requested that the Department treat the CMAs as confidential and not place any portion on the public record or otherwise make the data available for public review. This motion supports Verizon MA's request that the Department accord the CMAs trade secret or confidential protection in accordance with G.L. c. 25, § 5D. As shown below, the data qualifies as "trade secret" or "confidential, competitively sensitive, proprietary information" under Massachusetts and federal law and is entitled to protection from public disclosure in this proceeding.[2]

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[1] Footnote 18 of the Massachusetts PAP Guidelines states:

> A two-year statute of limitation on challenges to PAP performance will be adopted and effective July 25, 2003 for the June 2003 performance report. The initiation of this provision is contingent upon Verizon providing the algorithms in a structure format, related to the PAP metrics to the Department prior to July 25, 2003. Verizon MA will provide notice to CLECs receiving PAP reports that it has satisfied this obligation. (Guidelines at 20)

[2] Verizon MA noted in the filing that the CMAs are also protected by copyright and intellectual property laws. *See generally* 17 U.S.C. §§ 101, *et. seq*. ("Copyrights"). The appropriate copyright designation was placed on the CMAs.

ARGUMENT

In determining whether certain information qualifies as a "trade secret,"[3] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which

[3] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).[4]

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 *et seq*., also provides further protection for the confidential and proprietary information of telecommunications customers and carriers. *See* 47 U.S.C. § 222. Among other things, § 222 protects both customer proprietary network information and the confidentiality of proprietary carrier data.[5]

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[4] *See also, e.g., Hearing Officer's Ruling on Motions for Protective Treatment,* D.T.E. 99-105 (2000).

[5] Section 222(f)(1) defines "customer proprietary network information" in relevant part as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

In addition, §§ 222(a) and (b) provide:

> (a) IN GENERAL – Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.
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> (b) CONFIDENTIALITY OF CARRIER INFORMATION – A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

The CMAs meet the criteria noted above for "trade secrets" or "confidential, competitively sensitive, proprietary information" because they reveal commercially sensitive information that is not in the public domain, nor generally available to competitors of Verizon MA. The information contained in the CMAs is unique to Verizon and the information – containing computer code – is used for a very specific purpose within the Company. Additionally, Verizon has undertaken extensive time and invested significant financial resources in the development continued security of the CMAs.[6] The CMAs were formulated by means of a lengthy development process that involved the work of numerous persons at Verizon. The development process, which also involved the other Verizon East jurisdictions, took almost two years. It is estimated that it cost several million dollars to produce the initial CMAs in New York. Verizon continues to incur expenses to keep the CMAs current with industry changes and state agency orders.

Additionally, public disclosure of the information contained in the CMAs would cause unfair economic and competitive disadvantage to Verizon. If the CMAs are made publicly available, no CLEC would have to incur the time and expense necessary to develop comparable intellectual property. If the CMAs are not protected, any person or company, in addition to CLECs, could obtain the code. For example, a consultant could obtain it at no cost and use the CMAs to provide services to the CLECs to analyze Verizon's C2C data or as a basis to develop performance reports for other carriers to manage their own businesses.

[6] The CMAs have been provided to auditors in other states pursuant to protective agreements. The auditors are reviewing Verizon's wholesale performance plans and metrics in those states. Verizon has strived to assure that the CMAs are treated as proprietary information.

Consistent with the MA PAP Guidelines, Verizon MA provided the CMA's to the Department and notice to CLECs receiving PAP reports that it has satisfied this obligation. The CMAs will be provided to CLECs that may be legitimately interested in obtaining the CMAs pursuant to a Protective Agreement and a Licensing Agreement. Any CLEC that wants to obtain the CMAs should contact Verizon MA. That CLEC will be provided with an appropriate Licensing Agreement. The Agreement will contain proposed terms that will govern an unregulated, commercial relationship between Verizon and the party obtaining the CMAs. The Licensing Agreement will indicate, among other things, that the CMAs are Verizon's proprietary information and that the CMAs may not be reproduced or compiled without a separate agreement and an agreement to maintain the confidentiality of the information.[7]

CONCLUSION

WHEREFORE, Verizon MA respectfully requests that the Department grant this Motion to afford confidential treatment to the Carrier-to-Carrier Metric Algorithms filed

[7] In fact, Verizon NY offered to provide the CMAs to CLEC members of the Replication Subgroup in the C2C proceeding. Pursuant to the C2C Guidelines, Appendix R and applicable Commission decisions, discussions and information exchanged in the context of the NY Carrier Working Groups and meetings are confidential to that proceeding.

on July 25, 2003. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

Respectfully submitted,

VERIZON MASSACHUSETTS

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Dated: August 11, 2003